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In the

Supreme Court of the United States

October Term, 1948

No. 229

E. J. HOUNSELL, Administrator of the Estate of Nellie Hounsell, deceased,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Respondent.

REPLY TO RESPONDENT'S BRIEF

Respondent contends there is no substantial Federal question involved in this case and that the Supreme Court of Wisconsin decided this case upon the evidence.

THE QUESTION IS SUBSTANTIAL

Illinois has a similar statute as does Connecticut. (see note). The question is substantial. Particularly is this true because of the common practice during the war years of putting monies in bank accounts of men in service in the names of parent and service man for convenience and the growing practice of others to do likewise.

A FEDERAL QUESTION IS INVOLVED.

The Supreme Court of Wisconsin has construed this Statute (72.01) (6) so as to (a) preclude the consideration of evidence (b) create a conclusive presumption and (c) create facts contrary to actualities; all of which is not due process. (see brief in support of petition for a writ).

Revised Statutes of Illinois, Chapter 120, Section 375, subsection 5, as follows: "Whenever property, real, personal, or mixed, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositories in the joint names of two or more persons, and payable to either or the survivor, upon the death of one of such persons, the right of the surviving joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this Act in the same manner as though a fractional part of the property to be determined by dividing the value of the entire property by the number of joint tenants, joint depositors or persons, belonged absolutely to the deceased joint tenant, joint depositor or person and had been devised or bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will."

Section 396e, 1939 Supplement to the General Statutes of Connecticut, as follows: "whenever property shall be held in the joint names or two or more persons and the survivor or survivors of them, the right of the survivor or survivors to the immediate ownership or possession and enjoyment of such property shall be taxable transfer and the tax shall be computed as though a fractional part of the property, determined by dividing the fair market value of the entire property by the number of persons in whose joint names it was held, belonged absolutely to the deceased person and had been bequeathed or devised by him to the survivor or survivors by will; provided, in addition to any exemption granted under the provisions of this chapter, the provisions of this section shall not render subject to a succession tax joint checking or savings accounts in banks or savings banks payable to either or to the survivor if the aggregate thereof shall be less than five thousand dollars, but a fractional share of any excess over five thousand dollars shall be taxable. The provisions of this section shall not be construed to prevent the taxability, in whole or in part, under the provisions of subsection (c) or (d) of section 395e of any property held in the joint names of two or more persons and the survivor of them, including any joint checking or savings account in any bank or savings bank. The limitations imposed by section 1360 shall apply to any tax imposed under the provisions of this section."

(a) "The terms of the statute leave no room for questioning from where the interest of each of the parties came." This makes documentary title conclusive and prevents the consideration of the most important fact in this case. The question at issue was whether Nellie Hounsell had any interest in the properties in question when she died. E. J. Hounsell claimed it was his money that he put in the bank and invested in the two names and Nellie Hounsell contributed nothing and that he had no intent to give his wife an interest and there was no delivery or surrender of control.

The Court however stopped this claimant short at the first point. It would not consider the fact that this was E. J. Hounsell's money at any time.

(b) Documentary title according to the Court became final. It further said "All that is needed to set the statute in motion is to have property in the joint names of the parties. When that is the case and one of the parties dies the right of the other to the whole shall be deemed a transfer of one-half." A conclusive presumption is thus created when properties are in two names. Whether this was done by fraud, mistake or for convenience and created an agency is immaterial.

(c) The Court's construction of this statute made one-half of the properties in question pass on the death of Nellie Hounsell to E. J. Hounsell as though she willed it to him **even though all interest in this property** was E. J. Hounsells.

If for instance A invested in mortgages through a

real estate agent who took them in the name of A and B without the knowledge of either A or B. Upon the death of B according to this statute and this Court one-half of the property passes to A as though B willed it to A. A was always the owner and now must pay a transfer tax on his own properties because A died. Such is the effect of this decision.

Any one of the foregoing raised a Constitutional question and is sufficient to invalidate Sec. 72.01 (6) Wisconsin Statutes 1945.

Schlesinger v. Wis. 270 U. S. 230
Hoeper v. Tax Com. 284 U. S. 206
Western & All. Ry v. Henderson 279 U. S. 639
Manley v. Ga. 279 U. S. 1
McFarland v. American Sugar Ref. Co. 241 U. S. 79

THE COURT DID NOT DECIDE THIS CASE UPON THE EVIDENCE.

Respondent alleges that the Supreme Court of Wisconsin decided this case upon the evidence. In reply it is self evident that this is not true if the Court could not consider whether E. J. Hounsell earned this money and invested it and caused documentary title to be in two names with no intent to make a gift.

According to all Wisconsin cases referred to in the decision no gift was made according to the facts. These cases are not overruled. They are not in point said the Court R. pg. 67, because this Statute was not involved. It is the statute that precludes the consideration of the material facts as was done in those cases.

It is to be noted that there was no cross examination and no evidence introduced by respondent and also that the inventory quoted from was never offered nor received in evidence. Although put in the record by the trial Court after rendering his decision and the Bill of Exceptions had been settled the Supreme Court did not consider this challenged error because it was not necessary because of the view the Court took of this case. Thus undisputed testimony was not considered by the Supreme Court. If it had and still the Court arrived at the conclusion it did it would have overruled a long line of Wisconsin cases. Said the Court, R. pg. 67, "In none of these cases concerning the question of joint ownership was there an inheritance tax problem involved. None of these cases arose under section 72.01 (6)."

"The title, to the real and personal property involved in this appeal was so fixed as to make E. J. Hounsell and his wife joint tenants." The documentary title was all the Court needed to consider.

CONSTITUTIONALITY

Respondent claims this statute is valid citing Helvering v. City Bank Farmers Trust Company, 1935, 296 U. S. 85. The last paragraph of this case affirms the principles and cases upon which appellant relies.

> "There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in con-

templation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to the transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment. 17. In the same catagory falls a statute seeking to tax separate income of a wife as income of her husband. 18.

17. Heiner v. Donnan, 285 U. S. 312. 76 L. ed 772, 52 Sup. Ct. 358. Compare Schlesinger v. Wisconsin 270 U. S. 230, 80 L. ed 68, 70 L. ed 557, 46 S. Ct. 260, 43 A. L. R. 1224.

18. Hoeper v. Tax Commission, 284 U. S. 206, 76 L. ed 248, 52 S. Ct. 120, 78 A. L. R. 346.

LOCAL QUESTION

Respondent contends this is a local question citing Wallace v. St. John (1903) 119 Wis. 585, 97 N. W. 197. There was no issue in this case as to whether the property was the husband's or the wife's. As in respondent's assumption throughout his brief it was taken for granted that the title was jointly held. This is not true in this case according to the facts. It is the statute that makes the documentary title conclusively joint. We concede that if the property was in fact jointly owned, then on the death of Nellie Hounsell one-half passed and this transfer is subject to the tax and a local question is involved but since the property was not in fact joint counsel's argument is not in point. Said the Court in substance that because no trust was involved in this case therefore it would not consider the facts.

Respondent (brief Pg. 6) refers to bank signature cards. The statements therein establish the rela-

tionship between the bank and the depositor and do not effect title to the deposits.

Marshall & Illsley Bank v. Voight 214 Wis. 27 on pg. 33, 252 N. W. 355 on pg. 354.

Also respondent says the lower Court and the Supreme Court said the testimony of E. J. Hounsell was inadmissable (brief Pg. 8) Both Courts held that Hounsell could not testify as to transactions with the deceased. R. Pg. 69 R. Pg. 32. All other testimony was admissable. Because the question was raised by Amicus Curae the Court expressed its views. There was ample undisputed admissable testimony by E. J. Hounsell that it was his money deposited and invested. He earned the money. It was the statute that precluded this evidence and not the local law.

Respondent says in his brief page 10, "It reviewed the laws of Wisconsin and particularly the decision in the estate of Staver, 1935, 218 Wis. 114, 260 N. W. 655 where it was held that where property stands in the joint names of two persons a joint tenancy exists so that the survivor takes title unless there is presented clear and satisfactory evidence establishing a transaction which amounts to a trust or the existence of an agency." I do not believe this to be the law of Wisconsin.

Estate of Krause, 1942, 241 Wis. 41, 4 N. W. 2nd 122.

In that more recent case the intent of the depositor and the surrender of control were dominant

facts. In the absence of these elements no gift was made when A deposited money in a bank in the name of A and B. There was no trust or agency considered. The deposit was made for the purpose of securing additional Government protection.

If the Supreme Court of Wisconsin said the law was as respondent claims in his brief citing the Staver case then the law clearly would deprive one of property without due process because the facts could not be shown as to the ownership in any case not involving a trust or an agency.

In the Hounsell case the Court said the Staver, Krause and Voight cases were not in point. "In none of these cases concerning the question of joint ownership was there an inheritance tax problem involved. None of these cases arose under section 72.01 (6)." It was this Statute that made the Hounsell case different from those cases. It was the statute that prevented consideration of the facts as was done in the Krause case. It was the statute that prevented consideration of where the property came.

Respectfully submitted,

A. D. SUTHERLAND,

Atty. for Estate of Nellie Hounsell deceased.
E. J. Hounsell, administrator.